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In The
Supreme Court of the United States

RASUL, SHAFIQ, et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

AL ODAH, FAWZI K., et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF FORMER U.S. GOVERNMENT OFFICIALS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

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INTEREST OF *AMICI CURIAE*

Amici are former U.S. government officials who have exercised legal responsibility over matters concerning the U.S. Naval Base at Guantanamo, the Panama Canal, or other U.S. bases on foreign soil and those whose responsibilities substantially involved the scope of U.S. jurisdiction and activities abroad.[1] In so doing, they have acted under the conviction that the Constitution constrains the authority of U.S. government officials acting in these places. *Amici* include:

The *Honorable John H. Dalton* (1993-1998) and the *Honorable Richard Danzig* (1998-2001) each served as Secretary of the Navy. Danzig (1993-1997) and the *Honorable Jerry MacArthur Hultin* (1997-2000) served as Under Secretary of the Navy. The *Honorable Carolyn H. Becraft* was Assistant Secretary of the Navy (Manpower and Reserve Affairs) from 1998-2001.

The *Honorable Philip B. Heymann* (1993-1994) served as Deputy Attorney General of the United States with responsibility for overseeing law enforcement activities abroad.

The *Honorable Doris Meissner* was Commissioner of the INS from 1993-2000, Acting INS Commissioner in 1981, and Executive Associate Commissioner from 1982-1986. *T. Alexander Aleinikoff* served as General Counsel and then as Executive Associate Commissioner for Programs of the INS from 1994-1997.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief.

The *Honorable Patricia Wald* was Assistant Attorney General in the Office of Legislative Affairs from 1977-1979, a judge on the U.S. Court of Appeals for the District of Columbia Circuit from 1979-1999, and served as Chief Judge from 1986-1991.

SUMMARY OF ARGUMENT

Petitioners have been apprehended and transported halfway around the world to be held at Guantanamo Bay Naval Base, Cuba. The U.S. Government now claims that no court has jurisdiction to examine the lawfulness of any aspect of the regime under which petitioners may be detained, tried, or even executed.

As former government officials who have exercised legal responsibility over matters concerning Guantanamo and other areas outside U.S. borders, *amici* dispute this claim. Federal courts must have jurisdiction to review detention at Guantanamo because the United States exercises complete jurisdiction and control over that territory. In comparable areas where the United States has exercised sovereign powers without possessing titular sovereignty, the courts have held fundamental constitutional rights applicable to both citizens and foreign nationals under the rationale of the *Insular Cases*. The same reasoning mandates protection of fundamental constitutional rights of foreign nationals brought to Guantanamo.

Even putting aside the special character of Guantanamo, foreign nationals who have been subjected to prolonged custody under total U.S. control are entitled to fundamental due process rights. Providing due process protections at an offshore prison built by the United States in secure territory would not be "impracticable and anomalous" within the meaning of this Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990).

Finally, the court of appeals erred in extending the World War II-era precedent of *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), to allied nationals held at Guantanamo. Not only is *Eisentrager* clearly distinguishable, it rested on outdated assumptions about habeas corpus, and its policy rationale does not apply to the petitioners' detention.

ARGUMENT

I. ALIENS AT GUANTANAMO, A TERRITORY UNDER THE COMPLETE JURISDICTION AND CONTROL OF THE UNITED STATES, ARE PROTECTED BY FUNDAMENTAL CONSTITUTIONAL RIGHTS

Guantanamo Bay Naval Base has a total area of over forty-five square miles, thirty-one of them on land.[2] Its land area is roughly the size of St. Thomas, V.I.; it is larger than Manhattan, and nearly half the size of the District of Columbia.[3] "The base is entirely self-sufficient, with its own water plant, schools, transportation, and entertainment facilities."[4] The base population has recently grown to 6,000, and "[i]n addition to McDonald's, there are now Pizza Hut, Subway and KFC [outlets]. Another gym is being built, and town houses, and a four-year college opens

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[2] See Navy Office of Information, *Statistical Information, U.S. Naval Base, Guantanamo Bay, Cuba* (1985); Wayne S. Smith, *The Base from the U.S. Perspective*, in *Subject to Solution: Problems in Cuban-U.S. Relations* 97, 98 (Wayne S. Smith & Esteban Morales Dominguez eds., 1988).

[3] See *The New Columbia Encyclopedia* 772, 1681, 2900-01 (William H. Harris & Judith S. Levy eds., 1975) (32, 22, and ca. 70 square miles, respectively).

[4] Smith, *supra*, at 98-99.

next month." Nancy Gibbs, *Inside 'The Wire'*, Time, Dec. 8, 2003, at 40. The current base commander describes it as "small-town America." Carol Rosenberg, *New Chief Brings Guantanamo Up to Date,* Miami Herald, Oct. 25, 2003, *available at* 2003 WL 65453538. The detention facility where petitioners are being held is "hidden away in a restricted area, behind armed checkpoints, several ridgelines from downtown." Matthew Hay Brown, *Oldest U.S. Base Overseas Harbors Hometown Feel,* Orlando Sentinel, Dec. 22, 2003, *available at* 2003 WL 70493321.

The United States is not sovereign over Guantanamo, but occupies that territory under an unusual indefinite lease, which provides that "the United States shall exercise complete jurisdiction and control over and within said areas" during the period of the occupation.[5] The lease agreement was continued in effect by a subsequent treaty in 1934, "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations." Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. 3, T.S. No. 866.[6]

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[5] Article 3 of the Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States *shall exercise complete jurisdiction and control* over and within said areas. . . .

Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. 3, T.S. No. 418 (emphasis added).

[6] The United States has consistently taken the position that the agreement continues indefinitely, until terminated by the mutual consent of the parties, despite the termination of diplomatic relations

(Continued on following page)

The unusual extent of U.S. powers at the Guantanamo base reflects its origins during the period of American colonialism. See, *e.g.*, George Stambuk, *American Military Forces Abroad* 19-22 (1963); Helmut Rumpf, *Military Bases on Foreign Territory*, in 3 *Encyclopedia of Public International Law* 381, 382-83 (1997). Cuba's agreement to provide coaling or naval stations was required by the Platt Amendment, a congressional measure that stated conditions governing the withdrawal of the U.S. military administration that had governed Cuba since the Spanish-American War. See Act of Mar. 2, 1901, ch. 803, 31 Stat. 895, 897-98 (1901); see also *Customs Duties – Goods Brought Into United States Naval Station at Guantanamo Bay, Cuba*, 35 Op. Att'y Gen. 536 (1929); Smith, *supra*, at 97.

At Guantanamo, the United States is accountable only to itself. U.S. law is the only law recognized and the only law applied. Guantanamo is the only U.S. overseas base without a Status of Forces Agreement defining the allocation of civil and criminal jurisdiction over military and other personnel. Given the totality of U.S. territorial jurisdiction over the base and the lack of access to the rest of Cuba since 1959, no such agreement is needed. Nor does the United States require Cuba's consent to bring prisoners to the base.

The Justice Department's own Office of Legal Counsel analyzed the effect of this "unusual international agreement" in a formal opinion in 1982. *Installation of Slot Machs. on U.S. Naval Base, Guantanamo Bay*, 6 Op. Off.

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between the United States and Cuba in January 1961. See State Territory, Jurisdiction, and Jurisdictional Immunities: International Leases, 1979 Digest of United States Practice in International Law § 1, 794-95 (Marian Lloyd Nash ed., 1983); Robert L. Montague, III, *A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem*, 50 Ky. L.J. 459, 468-69 (1962).

Legal Counsel 236, 237 (1982). Because the lease placed the base under the exclusive jurisdiction of the United States, the opinion concluded that it therefore came within the federal Anti-Slot Machine Act. *Id.* at 242.

"The United States is entirely a creature of the Constitution. Its power and authority have no other source." *Reid* v. *Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion) (footnote omitted); see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). Thus, the question before this Court is not whether the Constitution is in force at Guantanamo, but which constitutional protections apply to the detainees.

In the nineteenth century, this Court applied the Bill of Rights fully to all federally-governed territories. See, *e.g.*, *Springville* v. *Thomas*, 166 U.S. 707 (1897). In 1901, however, in the *Insular Cases*, a majority of the Court held that only "fundamental" constitutional rights extended by their own force to "unincorporated" territories.[7] The *Insular Cases* concluded that constitutional provisions do not extend to particular territory by the will of Congress, but rather, as a result of the *relationship* that Congress creates between the United States and the territory.[8] The *Insular Cases* forged a compromise between the forces of constitutionalism and the forces of empire by guaranteeing that the most fundamental constitutional rights would be

[7] The *Insular Cases* doctrine expounded in Justice Edward White's concurring opinion in *Downes* v. *Bidwell*, 182 U.S. 244, 287, 289 (1901), received majority approval in *Dorr* v. *United States*, 195 U.S. 138 (1904). It distinguished earlier cases as involving territories "incorporated" into the United States, holding that not all constitutional limitations extended to "unincorporated" territories. *Id.* at 142.

[8] Since the decline of colonialism, the doctrine has been reinterpreted as enabling Congress to avoid an overly rigid "imposition of unfamiliar and possibly unwanted rules on territorial cultures." *Rayphand* v. *Sablan*, 95 F. Supp. 2d 1133, 1138 (D. N. Mar. I. 1999), *aff'd mem. sub nom. Torres* v. *Sablan*, 528 U.S. 1110 (2000).

honored wherever the United States possesses governing authority. In such cases, it is the exercise of complete jurisdiction and control, not nominal sovereignty, that requires the United States to recognize fundamental rights.

Although Guantanamo is unusual, it is not *sui generis*. History records at least three other examples of territory outside U.S. territorial borders and sovereignty, but still under the complete jurisdiction and control of the United States: the Canal Zone, the Trust Territory of the Pacific Islands, and the former American sector in Berlin. In each of these instances, U.S. courts have, by extrapolation from the *Insular Cases,* found fundamental constitutional rights to be applicable to citizens and aliens within these territories. As in Guantanamo, the United States for strategic reasons gained full powers of jurisdiction and control over these territories, without ever possessing actual sovereignty.

A. The Canal Zone

The Canal Zone shares much common history with Guantanamo. In both cases, early in this century the United States acquired rights for a particular purpose in a zone of territory in a newly independent state, while reserving underlying sovereignty over the territory to the foreign state. As the century progressed, tensions resulted in both territories. In the case of Panama, these developments ultimately led to the return of jurisdiction over the Canal Zone under the Panama Canal Treaty of 1977, Sept. 7, 1977, U.S.-Panama, T.I.A.S. No. 10030. See, *e.g.*, Hans Smit, *The Panama Canal: A National or International Waterway?*, 76 Colum. L. Rev. 965 (1976).

Article II of the Isthmian Canal Convention of 1903 granted "to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal. . . . " Isthmian Canal Convention, Nov. 18, 1903, U.S.-Panama, art. II, 33

Stat. 2235. Like the Guantanamo lease, Article III granted the United States

> all the rights, power and authority within the zone . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

Id. at art. III.

U.S. governance of the Canal Zone exhibited striking parallels to Guantanamo. The Canal Zone was "in effect one great government reservation." R.R. Baxter, *The Law of International Waterways* 86 (1964). The Canal Zone government was wholly non-elective.[9] Virtually all the land in the Canal Zone was owned by the U.S. government and occupied under revocable licenses issued by the Governor. Baxter, *supra*, at 85-86; C.Z. Code tit. 2 §§ 331-334 (1963). The presence of both U.S. citizens and foreign nationals within the Canal Zone was "at the suffer[a]nce of the U.S. Government," *Lucas* v. *Lucas*, 232 F. Supp. 466, 469 (D.C.Z. 1964), and citizens and aliens alike were subject to deportation from the Zone under broad criteria of public interest. See C.Z. Code tit. 2, § 841; Classes of Persons Subject to Exclusion or Deportation, 35 C.F.R. § 59.1 (1976); *cf. Canal Zone* v. *Gonzalez T. (Tunon)*, 607 F.2d 120 (5th Cir. 1979) (holding that deportation procedures complied with due process).

[9] Its Governor was appointed, by tradition, from the Army Corps of Engineers, and also served as president of the government-owned Panama Canal Company. C.Z. Code tit. 2, §§ 32, 64 (1963); Baxter, *supra*, at 85. The Governor exercised extensive quasi-legislative and executive powers, subject to a Canal Zone Code enacted by the U.S. Congress and the oversight of the Secretary of the Army and the President. C.Z. Code tit. 2, § 31.

As the era of colonialism receded, the courts came to protect rights in the Canal Zone just as they treated them in unincorporated territories of the United States.[10] Although some decisions have relied on a statutory bill of rights set out by Congress in the Canal Zone Code, others[11] have subjected U.S governmental actions, including federal statutes, directly to constitutional scrutiny.

Because the doctrine of the *Insular Cases* concerned the status of territories, not of persons, fundamental constitutional rights were equally applicable to United States citizens and aliens in the Canal Zone and other unincorporated territories. See, *e.g.*, *Examining Bd. of Eng'rs, Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572 (1976) (Puerto Rico). The Fifth Circuit recognized this equality of rights in *Canal Zone* v. *Scott*, 502 F.2d 566, 568 (5th Cir. 1974) ("[N]on-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive.").[12] The Fifth Circuit has also subjected congressional

[10] See, *e.g.*, *United States* v. *Husband R. (Roach)*, 453 F.2d 1054, 1057 (5th Cir. 1971) (characterizing Canal Zone as "unincorporated territory" for constitutional purposes), *cert. denied*, 406 U.S. 935 (1972); see also *Canal Zone* v. *Scott*, 502 F.2d 566, 570 (5th Cir. 1974).

[11] See, *e.g.*, *Jimenez* v. *Tuna Vessel "Granada"*, 652 F.2d 415 (5th Cir. 1981) (finding district court denied defendant due process); *In re Gayle*, 136 F.2d 973 (5th Cir.) (construing Canal Zone Code against its literal meaning to avoid a due process violation), *cert. dismissed*, 320 U.S. 806 (1943); *Walker* v. *Chief Quarantine Officer*, 69 F. Supp. 980 (D.C.Z. 1943) (applying Thirteenth Amendment and due process clause to a civilian employee of Army); *Canal Zone* v. *Castillo L. (Lopez)*, 568 F.2d 405 (5th Cir.) (upholding vagrancy provision of the Code against a due process vagueness challenge), *cert. denied*, 436 U.S. 910 (1978).

[12] See also *Husband R. (Roach)*, 453 F.2d at 1058 ("In areas under the jurisdiction of the United States to which the Fifth Amendment is applicable, an alien is entitled to its protection to the same extent as a citizen.").

legislation that allegedly discriminated against noncitizens in the Canal Zone to constitutional review. See *Raven* v. *Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978) (upholding denial of Privacy Act rights to a Panamanian employee against an equal protection attack), *cert. denied*, 440 U.S. 980 (1979).

The status of Guantanamo has been characterized as "in substance identical with that in the [Panama] Canal Zone." Sedgwick W. Green, *Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 Harv. L. Rev. 781, 792 (1955); see also *Customs Duties – Goods Brought Into United States Naval Station at Guantanamo Bay, Cuba*, 35 Op. Att'y Gen. 536 (1929) (relying on this comparison); Law of the Sea and International Waterways: Canals, 1977 Digest of United States Practice in International Law § 7, 593-94 (John A. Boyd ed., 1979) (analogizing Canal Zone and Guantanamo); Stambuk, *supra*, at 20 (analyzing Guantanamo and Canal Zone rights in parallel); Rumpf, *supra*, at 382-83 (same). Given that aliens enjoyed fundamental constitutional rights in the Canal Zone, there can be no basis for denying those same rights to aliens who are being held on Guantanamo.

B. The Trust Territory of the Pacific Islands

U.S. courts have similarly held that the federal government must respect the fundamental constitutional rights of noncitizens in the Trust Territory of the Pacific Islands ("TTPI"). After liberating Micronesia from Japan in the Second World War, the United States sought to retain strategic control by establishing a "strategic trust territory" under the supervision of the United Nations Security Council.[13] Article 3 of the Trusteeship Agreement

[13] See Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 487-513 (1989); Stanley K. McLaughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions* 461-78 (1995).

gave the United States "full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement." Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, U.S.-U.N., art. 3, T.I.A.S. 1665.

From 1952 on, the TTPI was administered by the Department of the Interior, which exercised both executive and legislative powers and appointed TTPI judges. Local legislative bodies had powers subordinate to the Secretary of the Interior. Ultimately, the Northern Mariana Islands joined the United States as a Commonwealth; three other regions chose independence but remained states in free association with the United States after the U.S. Trusteeship over them terminated in 1986 (1994 for Palau).

During the Trusteeship, the United States exercised complete jurisdiction and control over the TTPI without being sovereign there. *Callas* v. *United States*, 253 F.2d 838, 839-40 (2d Cir.) (holding TTPI a "foreign country" for Federal Tort Claims Act purposes), *cert. denied*, 357 U.S. 936 (1958). Persons born in the Trust Territory were aliens in relation to the United States. *Id.* at 842 (Hincks, J., concurring).

Nevertheless, federal courts regularly held that the Constitution directly extended rights to TTPI inhabitants and other aliens in the Trust Territory and bound the federal government.[14] In *Ralpho* v. *Bell*, 569 F.2d 607, 618-19 (D.C. Cir.), *reh'g denied*, 569 F.2d 636 (D.C. Cir. 1977), the court of appeals held that the Due Process Clause constrained the Micronesian Claims Commission, a congressionally created federal agency based in Saipan, in its adjudication of inhabitants' claims. The court concluded that because the inhabitants of the Trust Territory were as

[14] From 1952 onward, the Trust Territory Code included a Bill of Rights promulgated by the Secretary of the Interior, which bound the Trust Territory government but did not bind Congress or the Secretary. The cases cited here address the direct application of constitutional rights.

fully subject to American governing power as those of an unincorporated territory, fundamental constitutional rights vis-à-vis the federal government extended to noncitizens in the territory. Similarly, in *Juda* v. *United States*, 6 Cl. Ct. 441 (1984), the United States Claims Court held that the Takings Clause protected noncitizens as well as United States citizens in the Marshall Islands. Accord *Nitol* v. *United States*, 7 Cl. Ct. 405 (1985); see also *Porter* v. *United States*, 496 F.2d 583 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975) (finding taking not attributable to United States).

Even after local constitutional governments had been established in the four regions, the U.S. District Court for the Northern Mariana Islands held that the remaining operations of the federal High Commissioner were required to respect the fundamental rights of the inhabitants under the *Insular Cases*. See *Temengil* v. *Trust Territory of Pacific Islands*, 33 Fair Empl. Prac. Cas. (BNA) 1027, 1058-60, 1983 U.S. Dist. Lexis 18384, *112-*121 (D. N. Mar. I. 1983) (finding Fifth Amendment equal protection and due process requirements directly applicable to salary discrimination in TTPI government employment), *aff'd in part, rev'd in part on other grounds*, 881 F.2d 647 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990).

C. The American Sector in Berlin

After the Second World War, the four Allied Powers undertook the military occupation of Germany. Even after the occupation of the rest of Germany had ended, occupation of Berlin continued until 1990 under the umbrella of the Allied Kommandatura, with each of the Four Powers governing its own sector. See *United States* v. *Tiede*, 86 F.R.D. 227, 229-35 (U.S. Ct. for Berlin 1979); Peter E. Quint, *The Constitutional Law of German Unification*, 50 Md. L. Rev. 475, 597-99, 611-20 (1991). Day-to-day governing responsibility in West Berlin was exercised by an indigenous government, but subject to the supreme authority of the Four Powers.

The constitutional status of the American sector in Berlin was analyzed in Judge Stern's opinion in *Tiede*, concerning the criminal trial of two East Germans by the American authorities in Berlin for airplane hijacking. Judge Stern held, first, that the Constitution was by definition operative in an American court, and that due process prohibited the U.S. government prosecutors from dictating to the judge the resolution of a constitutional issue. *Tiede,* 86 F.R.D. at 242-44.[15] He concluded that, whether under *Reid* v. *Covert* or under the *Insular Cases*, an alien defendant being prosecuted by the federal government in the American Sector in Berlin was entitled to such fundamental rights as due process and trial by jury. *Id.* at 249-53.

D. Guantanamo

Like the Canal Zone, the Trust Territories, and the American Sector in Berlin, Guantanamo is also a territory where, though the United States is not sovereign, fundamental constitutional rights apply to citizens and aliens alike under the rationale of the *Insular Cases*. See *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992) (concluding that the Constitution protects "aliens brought to and detained by [U.S.] personnel on a land mass exclusively controlled by the United States"), *vacated as moot sub nom. Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993).[16]

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[15] He held that by 1979, the status of the American sector for constitutional purposes could no longer be measured by precedents involving military occupation and enemy aliens. *Tiede,* 86 F.R.D. at 245-46.

[16] This Court vacated the *Haitian Centers Council* decision after the preliminary injunction that that decision affirmed was superseded by a permanent injunction. *Amici* cite the case not as precedent, but because its reasoning is correct.

The court of appeals erroneously denied the justiciability of constitutional rights at Guantanamo by misconstruing this Court's decision in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948). See *Al Odah* v. *United States*, 321 F.3d 1134, 1143 (D.C. Cir. 2003). In fact, *Vermilya-Brown* emphasized that whether a legal norm applied at a given location was a justiciable issue, and that it depended upon the objective conditions created by prior government action. 335 U.S. at 380. The Court observed that the extent of Congress's powers to regulate overseas bases under the "Territory or other Property" clause of Article IV did *not* depend upon obtaining "sovereignty in the political or any sense." *Id.* at 381. Because overseas possessions occupied a continuum of relationships to the United States, for purposes of wage regulation the majority perceived no dividing line separating a modern base leased from the United Kingdom in Bermuda from the earlier acquisitions of Guantanamo and the Canal Zone or island territories like Puerto Rico and Guam. *Id.* at 386-90; see also *United States* v. *Spelar*, 338 U.S. 217, 223-24 (1949) (Frankfurter, J., concurring) (legal significance of terms like "foreign country" or "possession" depends upon context).

Nor does the fact that Guantanamo is occupied as a military naval base somehow prevent the application of fundamental constitutional rights.[17] The United States possesses several "unorganized" insular territories, some of which – like Wake Atoll – are operated as military installations, but in all of them fundamental constitutional rights apply. See General Accounting Office, *U.S. Insular*

[17] Justice Edward White, in first expounding his theory that only fundamental constitutional limitations extend to territory not "incorporated" in the United States, explicitly had in mind "a naval station or a coaling station on an island" and an "inhabited strip of land" adjoining "an interoceanic canal," as well as entire islands. See *Downes* v. *Bidwell*, 182 U.S. 244, 311 (1901) (opinion of White, J.).

Areas: Application of the U.S. Constitution, GAO/OGC-98-5, at 7-10, 39-63 (1997). The other non-sovereign territories in which U.S. courts have applied constitutional rights have also had military features. The Canal Zone was a quasi-military reservation administered under Army supervision, subject to access restrictions even for U.S. citizens. The Pacific Islands were the sole example of a "strategic trust territory" created under Article 82 of the United Nations Charter. The Allies protected West Berlin as a "beleaguered island of freedom" in the midst of Communist East Germany. *Tiede*, 86 F.R.D. at 246.

To accept the lower court's denial of all constitutional rights to aliens on Guantanamo would affect more people than simply the petitioners in this case. First, operation of the base has traditionally depended upon foreign labor, and the United States has employed hundreds of foreign nationals at Guantanamo – including Cubans and Jamaicans, and more recently Filipinos – whom the lower court's ruling would leave without legal recourse. See Associated Press, *In Cuba, U.S. Relies on Low-Paid Help of Non-Americans,* Commercial Appeal (Memphis, TN), Feb. 1, 2002, at A7, *available at* 2002 WL 3461214 (noting presence of 1,000 foreign workers).[18]

Second, in the 1990s the Government repeatedly used Guantanamo as a holding center for thousands of refugees from Haiti and Cuba.[19] In litigation over the rights of detained refugees, the Second and Eleventh Circuits pointedly disagreed about the applicability of the Bill of Rights to aliens at Guantanamo. Compare *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326 (2d Cir. 1992)

[18] See Navy Office of Information, *Statistical Information, U.S. Naval Base, Guantanamo Bay, Cuba* (1985) (reporting 1,059 non-citizen employees).

[19] See Maria E. Sartori, *The Cuban Migration Dilemma: An Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens*, 15 Geo. Immig. L.J. 319 (2001).

(finding plaintiffs likely to succeed on their constitutional claims), *vacated as moot sub nom. Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993), with *Cuban-American Bar Ass'n* v. *Christopher*, 43 F.3d 1412 (11th Cir. 1995) (denying that rights exist).[20] Although the Second Circuit decision was eventually vacated as moot, *amici* submit that it was the better-reasoned opinion. Meanwhile, the New York district court held after trial that the operation of a long-term detention camp concentrating HIV-positive refugees at Guantanamo without adequate medical facilities violated both the procedural and substantive due process rights of the detainees. *Haitian Ctrs. Council, Inc.* v. *Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (vacated by Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994)). The government has since used Guantanamo as an interim detention and interrogation center for interdicted Chinese migrants and smugglers. See, *e.g.*, *United States* v. *Li*, 206 F.3d 56, 69 n.1 (1st Cir.) (Torruella, C.J., dissenting), *cert. denied*, 531 U.S. 956 (2000). Again, the lower court's ruling would deny legal recourse to all such individuals.

Third, the Government is now building a permanent prison on the base. See Neil A. Lewis, *U.S. Erecting a Solid Prison At Guantanamo for Long Term,* N.Y. Times, Oct. 22, 2003, at A20. Were this Court to hold that foreign nationals have no rights on Guantanamo, the Government could use that prison not just for suspected terrorists, but also for extraterritorial arrest and punishment of any alleged criminals, all outside the constitutional safeguards of the criminal justice system.

Although the United States has claimed in recent years that aliens at Guantanamo are outside the Constitution, in

[20] In *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), this Court upheld the Government's authority to return refugees directly from high seas interdiction, but did not discuss rights on Guantanamo.

practice, our government has consistently afforded them such protections. The United States exercises eminent domain power at Guantanamo, and the Court of Claims has assumed that the Takings Clause of the Fifth Amendment applied to a Cuban contractor there. *Huerta* v. *United States*, 548 F.2d 343 (Ct. Cl.), *cert. denied*, 434 U.S. 828 (1977) (finding that the claim failed on the merits). But see *id.* at 348 (Davis, J., dissenting in part) (finding a taking).[21] The United States exercises criminal jurisdiction over both citizens and aliens at Guantanamo, to the exclusion of Cuban law, and has traditionally brought civilian criminal defendants to the United States for prosecution, with full constitutional protections. See, *e.g.*, *United States* v. *Lee*, 906 F.2d 117 (4th Cir. 1990) (Jamaican national); *United States* v. *Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. citizen).

If aliens at Guantanamo had no constitutional rights, the Government would be free to revise this practice at will. Under the Government's current reasoning, the United States could have indefinitely detained, prosecuted, and convicted foreign nationals on Guantanamo, or even executed them there without ever affording them any constitutional rights, including habeas corpus.

II. EVEN PUTTING ASIDE THE SPECIAL CHARACTER OF GUANTANAMO, FOREIGN NATIONALS HELD IN PROLONGED UNITED STATES CUSTODY OUTSIDE THE UNITED STATES ARE PROTECTED BY THE DUE PROCESS CLAUSE

Other factors besides the special character of Guantanamo demonstrated in Part I entitle the petitioners to

[21] See also *Skip Kirchdorfer, Inc.* v. *United States*, 6 F.3d 1573 (Fed Cir. 1993) (upholding taking claim of U.S. company for property at Guantanamo).

due process protections. The petitioners allege that U.S. officials have wrongfully imprisoned them, for months running into years. Some claim to have been captured by bounty hunters and sold fraudulently to the United States, without receiving any opportunity to demonstrate their innocence. The court of appeals rejected their complaints, reasoning that nonresident aliens outside the sovereign territory of the United States lack constitutional rights of any kind. *Al Odah*, 321 F.3d at 1141. The lower court derived that theory from its misinterpretation of this Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), which held only that nonresident aliens without substantial connections to the United States are not protected by the Fourth Amendment against searches of their property in a foreign country. That holding does not entail the complete denial of all constitutional protection to foreign nationals subject to indefinite detention and pervasive control by the United States.[22] This Court should reject such a lawless interpretation.

If the Government denies that foreign nationals have rights, then by confining them at Guantanamo, it is engaged not in legal detention, but in a lawless exercise of naked force. The Constitution, taken as a whole, binds the conduct of the federal government wherever it acts. "[T]he Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Verdugo-Urquidez*, 494 U.S. at 277 (1990) (Kennedy, J., concurring). The question here is whether and how particular constitutional protections – especially the Due

[22] The D.C. Circuit has systematically overread that decision, even finding that there are no constitutional limits upon U.S. officials who torture foreign nationals abroad. See *Harbury* v. *Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds*, 536 U.S. 403 (2002).

Process Clause of the Fifth Amendment – apply to the petitioners in this case.[23]

Petitioners are "persons" in prolonged U.S. custody, deprived of liberty outside any active war zone or territory under belligerent occupation. As detainees, they are subject to comprehensive and unceasing control by U.S. officials claiming to act under U.S. law, and may well remain so for months or years. They therefore must be entitled to fundamental due process protection.[24]

The claim that aliens in federal custody outside the United States lack any constitutional rights mocks the purposes of rights provisions in our constitutional system. The Constitution *recognizes* rights; it does not merely *create* them. The Framers regarded fundamental constitutional rights like physical liberty and freedom of conscience as natural and inalienable rights of mankind.[25] Moreover, the system of legally enforceable constitutional rights legitimates the government's assertion of sovereignty over individuals by imposing compensating limitations on exercises of governmental power. See Henkin, *supra*, at 408-09. James Madison emphasized this function in his celebrated Report condemning the Alien and Sedition Acts: "Aliens are no more parties to the laws than

[23] As Justice Harlan phrased it, "The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place." *Reid* v. *Covert*, 354 U.S. at 74 (Harlan, J., concurring in the result) (emphasis omitted).

[24] Because this case only addresses the rights of long-term detainees in non-hostile territory, the Court need not decide the full range of the circumstances in which due process may limit U.S. government action abroad.

[25] See, *e.g.*, *Faretta* v. *California*, 422 U.S. 806, 830 (1975); Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 290-93 (1997); Louis Henkin, *Rights: American and Human*, 79 Colum. L. Rev. 406, 408-09 (1979).

they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage."[26]

Before the Second World War, this Court assumed that constitutional rights were unavailable – to both citizens and aliens – outside the borders of the United States. This obsolete assumption reflected the rigidly territorial methodology of turn-of-the-century conflict of laws. Compare, *e.g.*, *In re Ross*, 140 U.S. 453, 464 (1891) (Field, J.) ("The Constitution can have no operation in another country."), with *Pennoyer* v. *Neff*, 95 U.S. 714, 722 (1878) (Field, J.). But reliance on that assumption became untenable after the Second World War, as new global circumstances prompted, and new technology facilitated, broader extraterritorial activity. The post-war order condemned colonial acquisition; the United States adopted new forms of nonterritorial overseas presence; and extraterritorial enforcement of U.S. law mushroomed.

By the middle of the Cold War, this Court had decisively repudiated its geographically restricted approach to the Bill of Rights in *Reid* v. *Covert*, 354 U.S. 1 (1957), and *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960). Those cases held that the government must provide the safeguards of Article III and the Fifth and Sixth Amendments before inflicting punishment on civilian citizens accompanying United States armed forces abroad. The six Justices in the majority in *Reid* v. *Covert* offered two different approaches to determining which rights apply overseas. Justice Black wrote for four Justices favoring literal application of the Bill of Rights, while

[26] *Madison's Report on the Virginia Resolutions* (1800), *reprinted in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 556 (J. Elliot ed., 2d ed. 1836). For background on Madison's Report, see Gerald L. Neuman, *Strangers to the Constitution* 52-60 (1996).

Justices Frankfurter and Harlan applied a "'fundamental right' test [which is] . . . simila[r] to analysis in terms of 'due process.'" 354 U.S. at 53 (Frankfurter, J., concurring in the result); *id.* at 75 (Harlan, J., concurring in the result). A majority of the Court adopted Justice Black's approach in *Singleton*, 361 U.S. at 246-49.

Although *Reid* v. *Covert* involved only citizens, it destroyed the earlier assumption that constitutional rights were somehow territorially restricted. Lower courts subsequently extended constitutional analysis to extraterritorial law enforcement against noncitizens. See, *e.g.*, *United States* v. *Cortes*, 588 F.2d 106, 110 (5th Cir. 1975); *United States* v. *Toscanino*, 500 F.2d 267, *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974).

This Court finally began to explore the role of the Bill of Rights in extraterritorial criminal investigations in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990). Five Justices concluded that the Fourth Amendment has no application to the search of property belonging to a nonresident alien in a foreign country. The opinion of the Chief Justice placed particular emphasis on text of the Fourth Amendment's reference to a right "of the people." 494 U.S. at 265. The Chief Justice also emphasized the alien's lack of sufficient "connections" to the United States. 494 U.S. at 265, 271, 273, 274-75. Finally, the opinion drew on examples from different periods of constitutional history, suggesting that constitutional provisions may not apply to aliens (or citizens, for that matter) on the high seas or in foreign territory. 494 U.S. at 266-68.

But Justice Kennedy, the indispensable fifth member of the *Verdugo-Urquidez* majority, gave different, narrower reasons for limiting the scope of the Fourth Amendment. Applying the approach of Justice Harlan's concurrence in *Reid* v. *Covert*, he argued that the extraterritorial extension of the Bill of Rights should be determined by a contextual due process analysis to decide whether adherence to a specific constitutional guarantee would be "impracticable and anomalous." 494 U.S. at 277-78 (Kennedy, J.,

concurring). Applying that test, Justice Kennedy found imposition of Fourth Amendment warrant procedures on searches by U.S. agents in foreign countries impracticable, noting that different conceptions of privacy may prevail in other cultures. *Id.* at 278.[27]

Given these divergent analyses, *Verdugo-Urquidez* holds only – as the Chief Justice's opinion twice emphasizes – that the Fourth Amendment does not govern searches of nonresident aliens' property abroad. 494 U.S. at 261, 274-75. As the narrowest ground supported by a majority of the Court, Justice Kennedy's concurrence suggests that the government can rebut the textual breadth of a constitutional provision only by demonstrating that adherence to it would be "impracticable and anomalous." 494 U.S. at 278.[28]

It would be neither impracticable nor anomalous for the United States government to guarantee these alien petitioners due process. The Due Process Clause is phrased in universal terms, protecting any "person" rather than "citizens" or members of "the people." Nor does its wording suggest limitations as to place.

Standing alone, *Verdugo-Urquidez* does not clarify what circumstances other than citizenship, residence, and territorial presence should trigger the applicability of the Due Process Clause. But nonresident aliens are unquestionably "persons" capable of having due process rights. This Court has long held that aliens outside the United

[27] Justice Stevens agreed that the Fourth Amendment's warrant requirement should not apply abroad, given that a U.S. warrant would not be effective to authorize a search, and would have found the search reasonable. 494 U.S. at 279 (Stevens, J., concurring in the judgment).

[28] Unlike the court below, other courts of appeals have correctly recognized the limited nature of the *Verdugo-Urquidez* holding. See, *e.g.*, *United States* v. *Inigo*, 925 F.2d 641, 656 (3d Cir. 1991); *Lamont* v. *Woods*, 948 F.2d 825, 834 (2d Cir. 1991).

States are entitled to due process when they are sued as civil defendants in United States courts. See *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102 (1987). The Court has emphasized that this right "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Ins. Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

These cases also contradict any suggestion in *Verdugo-Urquidez* that aliens require "significant voluntary connection with the United States" to gain constitutional rights. *Verdugo-Urquidez*, 494 U.S. at 271. Under the minimum contacts doctrine of personal jurisdiction, it is precisely the *absence* of significant voluntary connection that forms the basis of the due process violation.

Nor has this Court ever suggested that U.S. courts can deny nonresident alien *plaintiffs* fair trials because of their location outside the territorial United States. U.S. courts undeniably stand open to suits by nonresident alien plaintiffs when jurisdiction over the defendant is proper.[29] Nor can prior "voluntary connection" to the United States be justified as a necessary prerequisite for fundamental due process protections. Maintaining involuntary captives of the United States as rightless outlaws because of their captive status would revive the logic of slavery, a constitutional practice that this country has long abandoned.

In any event, the Constitution undeniably protects involuntary subjects, such as children who may be too young to form voluntary connections. See *Plyler* v. *Doe*, 457 U.S. 202 (1982); *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976) ("Even one whose presence is this country is unlawful,

[29] See, *e.g.*, *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Taylor* v. *Carpenter*, 23 F. Cas. 742, 744 (C.C.D. Mass. 1844) (No. 13,784) (Story, Cir. J.) ("[T]hey are entitled, being alien friends, to the same protection of their rights as citizens.").

involuntary, or transitory is entitled to [due process] protection."). The very doctrine of the *Insular Cases* was designed to protect the fundamental rights of populations who had become involuntarily subjected to U.S. governance. Indeed, as Justice Kennedy noted, Verdugo-Urquidez himself, despite his involuntary presence, would enjoy all constitutional guarantees at trial. *Verdugo-Urquidez*, 494 U.S. at 278.

Finally, application of the Due Process Clause to foreign nationals held in custody by the United States at Guantanamo – or at other military bases in allied countries – would be in no sense "impracticable and anomalous." The petitioners are foreign nationals captured or arrested in distant foreign countries and deliberately transported by the government to the very threshold of the United States, in order to be detained, interrogated, and perhaps even tried and executed in an offshore prison camp. The base is highly secure, access is tightly restricted, and the detainees are totally under the government's control.

If the Due Process Clause does not apply to detainees at Guantanamo, the Government would have effective discretion to starve them, to beat them, and to kill them, with or without hearings and with or without evidence of any wrongdoing.[30] It could convict them on rumor and imprison them indefinitely, out of abundance of caution, to deter others, to reassure the public, or to conceal prior errors. In granting procedures, the Government could discriminate among detainees based on the color of their skin. If no constitutional rights applied to offshore detainees, then the government would be free to create a parallel

[30] While some of these actions would undoubtedly also violate international obligations of the United States, the Government denies the applicability of those norms, on grounds of location or status, and there are few effective mechanisms for enforcing them.

system of extraterritorial courts and extraterritorial prisons to punish extraterritorial crimes without legal oversight or constraint.

Surely this cannot be the law. Yet remarkably, the Government claims the *right* to such discretion as an inherent executive prerogative necessary to conduct a war against terrorism. But even if the Government could identify some concrete disadvantage from providing a particular due process protection, this would not automatically render applicability of the Due Process Clause to detention at Guantanamo "impracticable [or] anomalous." Due process is itself a flexible, contextual concept, which considers such disadvantages in balancing the needs of the government against the needs of the individual. *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976).

In sum, application of the due process clause to prolonged custody at an offshore facility under complete U.S. government control is neither "impracticable [nor] anomalous." What would be anomalous is authorizing the United States Government to create and run an offshore prison camp in a "rights-free zone" for the express purpose of evading constitutional restrictions.

III. THIS COURT'S DECISION IN *JOHNSON* v. *EISENTRAGER* DOES NOT PRECLUDE THE AVAILABILITY OF HABEAS CORPUS JURISDICTION FOR DETAINEES AT GUANTANAMO

Although the lower court relied heavily upon this Court's decision in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), that decision is clearly distinguishable and does not support the argument that courts lack jurisdiction over the petitioners' claims. Not only did *Eisentrager* rest

on since-overruled assumptions about habeas corpus, but its policy concerns are not implicated in this case.[31]

The Government maintains that simply being "captured abroad in connection with ongoing hostilities" places prisoners beyond the territorial reach of habeas corpus. But that sweeping generalization would extend *Eisentrager* far beyond its context. In *Eisentrager*, petitioners were indisputably nonresident enemy aliens[32] held in occupied territory during wartime, who had been tried and convicted by military commissions in recently liberated allied territory (then engulfed in civil war) and transferred to their homeland to serve their sentences. Here, by contrast, petitioners include nationals of allied countries who have not been charged, tried or convicted, and who fervently deny participation in any hostile action against the United States. Some allege that they were arrested in Pakistan, not Afghanistan; other Guantanamo detainees have reportedly been arrested in unrelated countries such as Bosnia, Gambia, and Zambia.[33]

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[31] The "minimum contacts" cases cited above illustrate the inaccuracy – even in its own day – of a dictum in *Eisentrager*, 339 U.S. at 770-71. While implying that an alien's presence within the territorial jurisdiction of the United States was somehow necessary for constitutional protection, Justice Jackson overlooked both the due process limitations on personal jurisdiction, and caselaw recognizing absent aliens as persons whose "private property" in the United States cannot be taken without just compensation. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931); see also *Sardino* v. *Fed. Reserve Bank of New York*, 361 F.2d 106, 111 (2d Cir. 1966) (Friendly, J.).

[32] The status of enemy alien in time of actual war constituted a well-established category of both U.S. and international law. The clarity of the status made it a useful device for regulating potentially hostile civilians without endangering neutral or allied nationals. Justice Jackson acknowledged its factual overbreadth, but relied on its lengthy legal pedigree in the United States and on the legal imputation of enemy allegiance to enemy nationals.

[33] See, *e.g.*, *U.K. Identifies British Captive,* Miami Herald, May 13, 2002, *available at* 2002 WL 19672415 (arrest in Zambia); Vikram Dodd,

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Significantly, *Eisentrager* conceded that enemy aliens convicted of war crimes in an unincorporated territory (namely, the Philippines, a few months before its independence), had access to habeas corpus. 339 U.S. at 779-80. Justice Jackson also noted that individuals detained in the United States under the Alien Enemies Act were entitled to review of the jurisdictional fact of enemy alien status on habeas corpus, even if not to review of their actual dangerousness.[34]

Eisentrager's territorial analysis also reflected the since-overruled opinion in *Ahrens* v. *Clark*, 335 U.S. 188 (1949), which treated the location of the petitioner – not the location of a relevant custodian – as the key to habeas corpus jurisdiction under federal statutes. In *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), this Court later rejected that interpretation of 28 U.S.C. § 2241, noting that it had already extended habeas corpus to citizens confined overseas outside any judicial district. 410 U.S. at 498. See also *Schlanger* v. *Seamans*, 401 U.S. 487 (1971) (emphasizing location of custodian); *Demjanjuk v. Meese*, 784 F.2d 1114 (D.C. Cir. 1986) (Bork, J.).[35]

The UK Businessmen Trapped in Guantanamo, The Guardian (U.K.), July 11, 2003, *available at* 2003 WL 56695608 (arrests in Gambia). Transfer from Bosnia to Guantanamo was documented in a critical decision of the transnational tribunal created by the Dayton Peace Accords. See *Boudellaa* v. *Bosnia and Herzegovina*, Nos. CH/02/8679, Oct. 11, 2002 (Human Rights Chamber for Bosnia and Herzegovina), *available at* http://www.hrc.ba (Algerian and Bosnian nationals).

[34] The Alien Enemies Act, 50 U.S.C. §§ 21-23, which applies during a "declared war," has not been employed since the Second World War, and the discretion that the statute delegated was later narrowed by U.S. adherence to the Fourth Geneva Convention. See Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 38, 42, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[35] *Eisentrager* also invokes an anachronistic view of habeas corpus as an exclusively Anglo-American institution. *Eisentrager*, 339 U.S. at

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More fundamentally, *Eisentrager* dates to a bygone era when a majority of the Court still adhered to the territorially restricted concept of the Constitution that it later abandoned in *Reid* v. *Covert*. Dissenting Justices had argued for an interpretation more consistent with the reality of the post-war global presence of the United States, but they did not persuade the majority until 1957.

Furthermore, the logistical and security concerns that informed the *Eisentrager* holding have no bearing here. The *Eisentrager* majority stressed the difficulty of transporting prisoners and witnesses from abroad. *Eisentrager*, 339 U.S. at 778-79. But that policy concern has been overtaken by modern telecommunications technology, which now enables courts to facilitate effective participation in judicial proceedings and provide due process by means of video teleconferencing.[36]

These factors counsel strongly against now extending *Eisentrager* to a factually distinct situation. *Eisentrager* expressed fear that the availability of habeas corpus for

779. Today, the right to a speedy judicial remedy for unlawful detention is a universally recognized human right. See [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(4), 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 9(4), 999 U.N.T.S. 171; American Convention on Human Rights, Nov. 22, 1969, art. 7(6), 1144 U.N.T.S. 123.

[36] See, *e.g.*, Fed. R. Civ. P. 43(a); 42 U.S.C. § 1997e(f) (authorizing use of telecommunications technology in litigation concerning prison conditions); 18 U.S.C. § 3265(a)(1)(B) (authorizing initial proceedings by telecommunications in prosecution of extraterritorial crimes by civilians accompanying armed forces). Because habeas corpus proceedings are civil in nature, see *Hilton* v. *Braunskill*, 481 U.S. 770 (1987); *Harris* v. *Nelson*, 394 U.S. 286 (1969), they are not subject to the concerns that this Court has expressed regarding a criminal defendant's Sixth Amendment right to physical confrontation of witnesses. *Cf. Maryland* v. *Craig*, 497 U.S. 836 (1990); *Amendments to the Federal Rules of Criminal Procedure*, 207 F.R.D. 89, 93 (2002) (statement of Scalia, J.).

"actual enemies" in active war zones or occupied territory would assist the enemy and hamper U.S. field commanders. 339 U.S. at 778-79. But even within the United States or its territories, Congress has undeniable power to suspend habeas corpus when invasion or ongoing conflict makes its use too dangerous.

During belligerent occupation, one might well worry about distant civilian courts compromising the efforts of outnumbered U.S. forces to govern a hostile population using the limited authority permitted by international law. But such policy concerns are wholly absent when the U.S. detains foreign nationals not in war zones or occupied lands, but in peaceful allied territory. *A fortiori* these concerns cannot justify denying the writ to persons brought deliberately by the U.S. government to territory where the U.S. is the only authority, precisely because they can be held there in total security.

The fact that some detainees have been *removed from* a war zone or zone of occupation cannot weigh against the availability of habeas corpus in their new, secure location. Even after World War II, when this Court understood the geographical scope of the writ more narrowly, it nonetheless permitted access to habeas for prisoners who had been transferred from occupied Germany to the United States, see *Wade* v. *Hunter*, 336 U.S. 684 (1949); *Madsen* v. *Kinsella*, 343 U.S. 341 (1952), and for a war criminal captured in the liberation of the Philippines, *In re Yamashita*, 327 U.S. 1 (1946). Even the ancient, outdated case of *In re Ross*, 140 U.S. 453 (1891), permitted a British national brought to the United States to serve his sentence to test by habeas the jurisdiction of a consular court in Japan.

Finally, *Eisentrager* states no absolute rule against access to habeas corpus, even for enemy nationals in occupied territory. Justice Jackson emphasized that "the doors of our courts have not been summarily closed upon these prisoners," and gave them the opportunity "to show some reason in the petition why they should not be subject to the usual disabilities of nonresident enemy aliens."

Eisentrager, 339 U.S. at 780-81. Unlike *Eisentrager*, the prisoners here are being held in unprecedented circumstances under a regime of recent invention whose legality has never been examined by any court. The U.S. government should not be permitted to evade judicial scrutiny by transporting them to Guantanamo instead of Puerto Rico.

CONCLUSION

The United States Constitution recognizes no rights-free persons or rights-free zones. Persons who have been deprived of their liberty must be granted an opportunity to challenge their subjection to a novel regime of detention before a civilian court.

For the foregoing reasons, this Court should reverse and remand the judgment of the Court of Appeals.

Respectfully submitted,

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